Tan Chin Kiat v Inspektor Mohd Firdaus bin Hassan & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–16–01 OF 2021
MUHAMMAD JAMIL J
18 FEBRUARY 2021

Criminal Procedure — Habeas corpus — Application for — Writ of habeas corpus against legality of detention — Whether s 4 of the Prevention of Crime Act 1959 contravenes arts 8 and 121 of the Federal Constitution — Whether organisation and promotion of unlawful gaming prescribed in para 5 Part I First Schedule of the Prevention of Crime Act 1959 falls outside the ambit and scope of art 149(1)(a) of the Federal Constitution — Prevention of Crime Act 1959 ss 3, 4, Part I First Schedule & Federal Constitution arts 8, 121, 149

The applicant was arrested by the first respondent under s 3(1) of the Prevention of Crime Act 1959 ('the Act'). The applicant was taken before a magistrate on 16 January 2021 pursuant to s 4(1)(a) of the Act. On production of a statement in writing by the first respondent, the magistrate remanded the applicant in police custody for a period of 21 days. The statement in writing by the first respondent stated that the applicant's name should be registred in the register in pursuant to s 12(1) of the Act for the unlawful gaming activities. The applicant stated that his detention was unlawful. Hence, the applicant filed this notice of motion ('encl 1') for a writ of habeas corpus on two grounds: (a) s 4 of the Act contravenes arts 8 and 121 of the Federal Constitution (para 6 of applicant's affidavit in support); and (b) the organisation and promotion of unlawful gaming prescribed in para 5 Part I First Schedule of the Act falls outside the ambit and scope of art 149(1)(a) of the Federal Constitution.

Held, allowing encl 1:

(1) Section 4 of the Act did not contravene art 121 of the Federal Constitution. The Federal Constitution empowered parliament, the legislative branch of the government to make laws. Parliament enacted the Act which confers power to the magistrate. Briefly art 121 of the Federal Constitution stated that the courts shall have such jurisdiction and powers as may be conferred by or under federal law (see para 10).

(2) Section 4(1)(a) of the Act confers power to the magistrate to remand the person in police custody for a period of 21 days. The magistrate was given no discretion and acts to the dictate of the executive not an issue. The remand order was made by the magistrate pursuant to s 4(1)(a) of the Act. The magistrate was vested with the powers under the Act. Such powers

under the Act was not synonymous with the magistrate executing his power under the Subordinate Courts Act 1948. As stated by Federal Court in *Jaideep Singh Dalip Singh v ASP Mahathir Abdullah Sapawi & Ors* [2018] 3 MLJ 1, under s 4(1)(a) of the Act the magistrate was not exercising a judicial power but rather a power of a detaining authority duly given under the Act. The Act was an Act which provided for preventative detention (see paras 11–13).

(3) The purpose of the Act in its long title was to provide for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto. The preamble of the Act had adopted the wordings of art 149(1) of the Federal Constitution to the effect that 'action has been taken and further action is threatened by a substantial body of persons'. The preamble had also recited the wordings 'to cause or to cause a substantial number of citizens to fear, organized violence against persons or property' obtained in para (a) of art 149(1) (see para 22).

(4) There was no evidence by any stretch of imagination that the applicant's activity involved any element of violence or organised violence. The applicant's activity was not a crime of organised violence. It was not an action which caused a substantial number of citizens to fear, organised violence against persons or property. This activity did not come within the ambit and scope of art 149(1)(a) of the Federal Constitution (see para 25).

[Bahasa Malaysia summary

Pemohon ditangkap oleh responden pertama di bawah s 3(1) Akta Pencegahan Jenayah 1959 ('Akta tersebut'). Pemohon telah dibawa ke hadapan majistret pada 16 Januari 2021 menurut keperluan s 4(1)(a) Akta tersebut. Menurut kenyataan secara bertulis oleh responden pertama, majistret telah mengarahkan pemohon direman dalam tahanan polis untuk tempoh 21 hari. Kenyataan secara bertulis oleh responden pertama menyatakan bahawa nama pemohon hendaklah didaftarkan dalam daftar menurut s 12(1) Akta bagi aktiviti perjudian yang menyalahi undang-undang. Pemohon menyatakan bahawa penahanannya adalah salah di sisi undang-undang. Justeru, pemohon telah memfailkan notis usul ini ('lampiran 1') untuk writ habeas corpus atas dua alasan: (a) s 4 Akta tersebut bercanggah dengan perkara 8 dan 121 Perlembagaan Persekutuan (perenggan 6 afidavit pemohon dalam sokongan); dan (b) penubuhan dan perbuatan perjudian yang menyalahi undang-undang yang ditetapkan dalam Perenggan 5 Bahagian I Jadual Pertama Akta itu jatuh di luar lingkungan dan skop perkara 149(1)(a) Perlembagaan Persekutuan.

Diputuskan, membenarkan lampiran 1:

(1) Seksyen 4 Akta tersebut tidak bercanggah dengan perkara 121 Perlembagaan Persekutuan. Perlembagaan Persekutuan memberi kuasa kepada parlimen untuk membuat undang-undang. Parlimen menggubal Akta yang memberi kuasa kepada majistret. Secara ringkasnya, perkara 121 Perlembagaan Persekutuan menyatakan bahawa mahkamah hendaklah mempunyai bidang kuasa dan kuasa sebagaimana yang diberikan oleh undang-undang persekutuan (lihat perenggan 10).

(2) Seksyen 4(1)(a) Akta tersebut memberi kuasa kepada majistret untuk mereman tertuduh di dalam tahanan polis untuk tempoh 21 hari. Majistret tidak diberi budi bicara dan bertindak dibawah kuasa eksekutif bukanlah satu isu. Perintah reman itu dibuat oleh majistret mengikut s 4(1)(a) Akta tersebut. Majistret telah diberi kuasa di bawah Akta tersebut. Kuasa sedemikian di bawah Akta tersebut tidak sama dengan majistret yang melaksanakan kuasanya di bawah Akta Mahkamah Rendah 1948. Seperti yang dinyatakan oleh Mahkamah Persekutuan di *Jaideep Singh Dalip Singh v ASP Mahathir Abdullah Sapawi & Ors* [2018] 3 MLJ 1, di bawah akta 4(1)(a) Akta tersebut, majistret tidak menjalankan kuasa kehakiman tetapi sebaliknya kuasa menahan yang diberikan di bawah Akta tersebut. Akta itu adalah Akta yang memperuntukkan penahanan pencegahan (lihat perenggan 11–13).

(3) Tujuan Akta tersebut di dalam tajuk panjangnya adalah untuk memperuntukkan pencegahan jenayah yang lebih berkesan di seluruh Malaysia dan untuk kawalan penjenayah, anggota pertubuhan rahsia, pengganas dan orang lain yang tidak diingini, dan bagi perkara-perkara yang berkaitan dengannya. Tajuk Akta tersebut telah memakai peruntukan di dalam perkara 149(1) Perlembagaan Persekutuan bahawa 'tindakan telah diambil atau diancam oleh satu mana-mana kumpulan besar orang'. Tajuk Akta tersebut juga telah mengambil peruntukan 'untuk menyebabkan keganasan terancang terhadap orang atau atau harta' seperti di dalam perenggan (a) perkara 149(1) (lihat perenggan 22).

(4) Tiada bukti yang menunjukkan bahawa aktiviti pemohon melibatkan sebarang unsur keganasan atau keganasan terancang. Aktiviti pemohon bukanlah satu jenayah keganasan terancang. Ia bukan satu tindakan yang menyebabkan sebilangan besar rakyat takut, menganjurkan keganasan terhadap orang atau harta benda. Aktiviti ini bukanlah tertakluk di dalam skop perkara 149(1)(a) Perlembagaan Persekutuan (lihat perenggan 25).]

Cases referred to

Jaideep Singh Dalip Singh v ASP Mahathir Abdullah Sapawi & Ors [2018] 3 MLJ 1; [2017] 10 CLJ 145, FC (refd)

Letitia Bosman v Public Prosecutor and other appeals (No 1) [2020] 5 MLJ 277; [2020] 8 CLJ 147, FC (refd)

A *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2021] 2 CLJ 29, FC (refd)

Legislation referred to

B Federal Constitution arts 8, 121, 149, 149(1), 149(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f)
Prevention of Crime Act 1959 ss 2(1), 3(1), 4, 4(1)(a), First Schedule
Subordinate Courts Act 1948

Jacky Loi Yap Loong (PG Cyrill with him) (TY Teh & Partners) for the applicant.
C *Siti Hajar bt Mat Radzi (Federal Counsel, Ministry of Home Affairs) for the respondents.*

Muhammad Jamil J:

D **[1]** On 25 January 2021 Tan Chin Kiat ('the applicant') filed a criminal application by way of a notice ('encl 1') seeking the following reliefs:

1. Perintah bahawa Pemohon dihadapkan dan/atau dibawa ke Mahkamah Yang Mulia ini untuk tujuan dan selama perbicaraan permohonan di sini;

E 2. Perintah bahawa penangkapan dan penahanan Pemohon di bawah Seksyen 3, 4 dan/atau peruntukan lain Akta Pencegahan Jenayah 1959 (Akta 297) adalah tidak sah, tidak berasas, tidak mematuhi prosedur dan bersifat *mala fide*;

F 3. Perintah bahawa penangkapan dan penahanan Pemohon adalah jatuh di luar ruang lingkup dan/atau skop Akta Pencegahan Jenayah 1959 (Akta 297) serta Akta Pencegahan Jenayah 1959 (Akta 297) ini tidak terpakai kepada Pemohon;

4. Perintah bahawa kemasukan perenggan 5 Bahagian 1, Jadual 1 di bawah Akta Pencegahan Jenayah 1959 (Akta 297) oleh Menteri, yakni semua orang yang terlibat dalam pengelolaan dan penggalakan judi haram sebagai kategori yang boleh didaftarkan adalah ultra vires dan di luar ruang lingkup dan/atau skop Akta Pencegahan Jenayah 1959 (Akta 297);

H 5. Perintah bahawa writ *Habeas Corpus* dikeluarkan bagi Pemohon dihadapkan dan/atau dibawa ke Mahkamah Yang Mulia ini untuk dibebaskan dengan serta-merta;

6. Sepatutnya dan selepas Pemohon dibebaskan, perintah bahawa Pemohon tidak boleh ditangkap dan/atau ditahan semula;

I 7. Bahawa pihak-pihak mempunyai kebebasan untuk memohon;

8. Perintah-perintah dan/atau arahan-arahan lain yang difikirkan patut dibuat atau diberi oleh Mahkamah Yang Mulia ini.

[2] The notice of motion is supported by the applicant's affidavit in support

('encl 3') affirmed on 25 January 2021.

[3] The respondents in opposing the applicant's notice of motion filed an affidavit in reply ('encl 5') affirmed by Inspektor Polis Mohd Firdaus bin Hassan on 29 January 2021.

[4] The background facts maybe summarised as follows:

(a) the applicant was arrested by the first respondent on 15 January 2021 under s 3(1) of the Prevention of Crime Act 1959 ('the Act');

(b) the applicant was taken before a magistrate on 16 January 2021 pursuant to s 4(1)(a) of the Act. On production of a statement in writing by the first respondent, the magistrate remanded the applicant in police custody for a period of 21 days;

(c) the statement in writing by the first respondent stated as follows:

1. Setelah meneliti keterangan-keterangan yang terdapat di dalam kes bagi penama tersebut di atas, maka saya INSP G/20866 MOHD FIRDAUS BIN HASSAN dengan ini menyatakan bahawa ada alasan-alasan bagi mempercayai penama tersebut patut dimasukkan ke dalam Senarai Daftar yang disimpan oleh Pendaftar di bawah seksyen 12(1) Akta Pencegahan Jenayah 1959.

2. Alasan-alasan adalah seperti berikut:

2.1 Satu laporan Polis bagi tujuan satu inkuiri untuk daftar di bawah Seksyen 12 Akta Pencegahan Jenayah 1959 telah dibuat berkenaan tangkapan penama.

2.2 Pada 31/12/2020 jam lebih kurang 12.05 tengah hari, bertempat di premis No A-21–1, Tingkat 21, Da Men Residensi, Persiaran Kewajipan USJ 1, 47600 Subang Jaya Selangor, subjek bersama saksi (A1), (A2), (A3), (A4), (A5), (A6), (A7), (A8), (A9) dan (A10) rakan sejenayah yang ditangkap dengan niat bersama telah menyebabkan laman web perjudian diterbitkan dalam (4) buah komputer bersama (24) unit telefon bimbit yang disimpan sebagai rumah judi terbuka. Subjek bersama rakan sejenayah menjadikan rumah tersebut sebagai pengumpulan bagi tujuan perjudian online di Malaysia. Dalam kejadian ini, subjek berperanan mengendalikan pengisian data maklumat pelanggan, memasukkan kredit dan mempromosikan perjudian online ini ke dalam komputer dan telefon bimbit bagi tujuan menarik minat pelanggan untuk membuat pertaruhan dalam perjudian online dengan menggunakan laman web *www.QUEENCITY88.com*. Subjek bersama rakan sejenayah telah membantu dalam menjalankan kegiatan perjudian online selama 24 jam sehari. Gaji yang diterima oleh subjek

A adalah antara RM2,000.00 hingga RM2,500.00 sebulan.

(d) the applicant stated that his detention is unlawful; and

(e) hence, the applicant filed this notice of motion for a writ of habeas corpus.

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[5] I heard the applicant's notice of motion on 5 February 2021. Learned counsel for the appearing for the respondents have filed their respective written submissions and submitted orally before this court.

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[6] I have read the affidavit filed by the applicant and the respondents. I have considered the written as well as oral submissions of learned counsel for the applicant and learned federal counsel for the respondents.

D **[7]** Learned counsel for the applicant raised two grounds to justify the detection of the applicant by the applicant by the respondents is unlawful. The two grounds are:

(a) s 4 of the Act contravenes arts 8 and 121 of the Federal Constitution (para 6 of applicant's affidavit in support); and

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(b) the organization and promotion of unlawful gaming prescribed in para 5 Part I First Schedule of the Act tolls outside the ambit and scope of art 149(1)(a) of the Federal Constitution.

F *First ground: Section 4 of the Act contravenes arts 8 and 121 of the Federal Constitution.*

[8] The applicant's submission:

G (a) s 4 of the Act is unconstitutional;

(b) s 4 of the Act contravenes the doctrine of separation of power. Article 121 of the Federal Constitution vested the judicial power to the court which is part of the basic structure of the constitution. The magistrate is given no discretion and acts to the dictate of the executive; and

H

(c) the power of dictation should be exercised by the executive, not by the magistrate. With the magistrate acts in administrative function under s 4(1)(a) of the Act, the judiciary has encroached into the power of the executive. This violated the doctrine of the separation of power.

I

[9] The respondent's submission:

(a) s 4 of the Act did not contravene art 121 of the Federal Constitution;

(b) under s 4 of the Act of magistrate is not exercising a judicial power under

art 121 of the Federal Constitution but a power of a detaining authority under the Act; and

(c) Federal Consitution empowers Parliament to enact laws. Parliament enacted the Act which confers power to the magistrate.

[10] In my view s 4 of the Act did not contravene art 121 of the Federal Constitution. The Federal Constitution empowers Parliament, the legislative branch of the government to make laws (*Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147). Parliament enacted the Act which confers power to the magistrate. Briefly art 121 of the Federal Constitution stated that the courts shall have such jurisdiction and powers as may be conferred by our under federal law.

[11] Section 4(1)(a) of the Act confers power to the magistrate to remand the person in police custody for a period of 21 days. The magistrate is given no discretion and acts to the dictate of the executive not an issue.

[12] The remand order is made by the magistrate pursuant to s 4(1)(a) of the Act. The magistrate is vested with the powers under the Act. Such powers under the Act is not synonymous with the magistrate executing his power under the Subordinate Courts Act 1948.

[13] As stated by Federal Court in *Jaideep Singh Dalip Singh v ASP Mahathir Abdullah Sapawi & Ors* [2018] 3 MLJ 1; [2017] 10 CLJ 145, under s 4(1)(a) of the Act the magistrate is not exercising a judicial power but rather a power of a detaining authority duly given under the Act. The Act is an Act which provides for preventative detention.

Second ground: The organization and promotion of unlawful gaming prescribed in para 5 Part I First Schedule of the Act falls outside the ambit and scope of art 149(1)(a) of the Federal Constitution.

[14] The applicant's submission:

(a) the Act is enacted pursuant to art 149 of the Federal Constitution. The Act comes within art 149(1)(a) namely the stated action is to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

(b) the applicant is detained for his envolvement in offences within para 5 Part I First Schedule of the Act namely in the organisation and promotion of unlawful gaming;

(c) unlawful gaming is not a crime of organized violence. It is not an action which causes citizens to fear, organized violence against persons or

property. The facts as in the written statement does not come within the description of a crime of 'organized violence' which is a portulate to warrant the exercise of the detaining power;

(d) there is no nexus between the facts appearing in the written statement and the object or purpose of the Act as expressed in its recited. The detention is based on grounds irrelevant to the Act; and

(e) the organization and promotion of unlawful gaming prescribed in para 5 Part I First Schedule of the Act falls outside the ambit and scope of art 149(1)(a) of the Federal Constitution. The detention of the applicant is therefore illegal.

[15] The respondent's submission:

(a) the preamble of the Act did not specifically refers only to element of violence or organized violence under art 149(1)(a) of the Federal Constitution. On the contrary, the preamble of the Act refers to art 149 in its entirely. The preamble also explained the objective and scope of the Act including action which is prejudicial to public order;

(b) the written statement clearly shows the applicant involved in the organizations and promotion of unlawful gaming. Its fall within the ambit and scope of para 5 Part I First Schedule of the Act. Unlawful gaming falls within the scope of art 149(1)(f) of the Federal Constitution namely the prejudicial to public order; and

(c) para 5 Part I First Schedule clearly shows unlawful gaming falls within the ambit and scope of the Act. The remand order under s 4(1)(a) of the Act is lawful.

[16] In my view there is merit as regards to the second ground raised by the applicant. The question is whether the applicant's activity in the organization and promotion of unlawful gaming prescribed in paragraph 5 Part I First Schedule of the Act falls within the ambit and scope of art 149(1)(a) of the Federal Constitution.

[17] The Act was enacted by Parliament pursuant to art 149(1) of the Federal Constitution. The long title and preamble to the Act reads:

> An Act to provide for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other desireable persons, and for matters incidental thereto.
>
> [1 April 1959, LN 85/1959]
>
> WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, or to cause a substantial number of citizens to fear, organizes violence against persons or property;

AND WHEREAS Parliament considers it necessary to stop such action; A

NOW, THEREFORE, pursuant to Article 149 of the Federal Constituiton IT IS ENACTED by the Parliament of Malaysia as follows:

[18] Article 149(1) of the Federal Constitution provides as follows: B

149(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body or persons, whether inside or outside the Federation:

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or C

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or D

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning or any supply or service to the public or any class of the public in the Federation or any part thereof; or E

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill. F

[19] Article 149(1) prescribes six separate categories of action enumerated under paras (a) to (f). G

[20] Registrable categories under s 2(1) of the Act means any of the categories prescribed in the First Schedule. Paragraph 5 Part I of First Schedule reads: H

5 All persons concerned in the organization and promotion of unlawful gaming.

[21] In *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2021] 2 CLJ 29 the Federal Court stated as follows: I

[40] The declared purpose of the Interpretation Acts as manifested in the long title to the Act was for the application, construction, interpretation and operation of written laws. Read in this light, s 17A underscores Parliament's intention that the interpretation and construction of any written law shall have regard to the

underlying purpose or object to the Act. And s 15 as amended further emphasies the point by stating that the long title and preamble and every schedule shall be construed and have effect as part of the Act. That in our view is the codification of purposive rule of construction, which is not merely confined to the provision of a section of the Act, but also includes the purpose or object manifest in the long title and preamble of the Act.

[22] The purpose of the Act in its long title is to provide for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societes, terrorist and other undesirable persons, and for the matters incidental thereto. The preamble of the Act had adopted the wordings of art 149(1) of the Federal Constitution to the effect that 'action has been taken and further action is threatened by a substantial body of persons'. The preamble had also recited the wordings 'to cause or to cause a substantial number of citizens to fear, organized violence against persons or property' obtained in para (a) of art 149(1).

[23] I agree with learned counsel for the applicant that the Act comes within the scope of art 149(1)(a) of the Federal Constitution namely to cause, or to cause a substantial number of citizens to fear, organize violence against persons or property.

[24] I have scrutinised the first respondent's written statement and affidavit in reply. It is apparent that the applicant was detained for his involvement in activity prescribed in para 5 part I First Schedule namely in the organization and promotion of unlawful gaming. The only activity of the applicant mentioned was in the organization and promotion of unlawful gaming. No mentioned of the applicant's activity involved and element of violence or organized violence.

[25] I agree with learned counsel for the applicant. The applicant's activity is not a crime of organized violence. It is not an action which causes a substantial number of citizens to fear, organized violence against persons a property. This activity does not come within the ambit and scope of art 149(1)(a) of the Federal Constitution.

[26] I do not agree with learned federal counsel that the applicant's activity falls within the scope of art 149(1)(f) of the Federal Constitution namely judicial to public order. This is because the preamble to the Act do not recite the wordings 'prejudicial to public order' prescribed in para (f) or art 149(1). The preamble to the Act had recited the wordings obtained in para (a) of art 149(1). In my view, the Act comes within the ambit and scope of art 149(1)(a) and not art 149(1)(A).

[27] To my mind, the fact that the applicant involved in activity as prescribed in para 5 part I First Schedule of the Act without any element of violence or organized violence cannot be deemed to fall within the ambit and scope of art 149(1)(a) of the Federal Constitution.

[28] There is no nexus between the applicant's activity and purpose of the Act as expressed in its preamble. I tried that the applicant's activity falls outside the ambit and scope of art 149(1)(a) of the Federal Constitution.

[29] I hold that the detention of applicant under s 4(1)(a) of the Act is unlawful. Accordingly I allowed para 5 of applicant's notice of motion (encl 1). A writ of habeas corpus is hereby issued and the applicant is set at liberty forthwith.

Enclosure 1 allowed.

Reported by Muhamad Azham Marwan